IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

No. 32

ALFRED E. ROTH,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY TO BRIEF FOR THE UNITED STATES.

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Pro se.

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The grossly inaccurate and misleading statements and erroneous conclusions of the Government in its brief compel a reply.[1]

GOVERNMENT'S POINT I.—PETITIONER'S POINT IV.

There was no evidence to support the verdict against the petitioner.

The statement of the Government on the first page of the argument (Gov. Br. 11 note 1) "Kretske often referred the

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[1]To call to the attention of the Court the erroneous, misleading and incomplete statements appearing in the narrative of the evidence in the Appendix pp. 98-152 would unduly burden the Court. Petitioner will therefore in his reply, confine himself to the argument in the body of the brief under point I, pp. 11-32.

prospective defendants to Roth" is incorrect and misleading. There is not one case in the entire record where the petitioner represented any *prospective* defendant. In the three criminal cases referred by Kretske (who at the time was in private practice) and relied upon by the Government, petitioner was engaged as counsel *after* the institution of a prosecution and apprehension of the defendants.

Another incorrect statement by the Government appears on pp. 12-13 Gov. Br. "Petitioners Roth (Br. 50-56) and Glasser (Br. 72-78) have pitched their contentions relating to the sufficiency of the evidence upon only a few isolated and specific cases involved in the conspiracy alleged." This petitioner in his petition pp. 5-10 and in his brief, in the statement of the case pp. 6-12 and in the argument pp. 50-55, has covered the substance of the ultimate facts with relation to him in *every* case on which the Government relies.

Note 5, Gov. Br. 14, which reads as follows: "In one case, involving the Stony Island Avenue still, Kretske, after offering to 'take care' of the case for $1,200 referred the members of the group to Roth.", is not clearly and fairly stated. *Only the defendants in the particular case* and not the members of the group were referred to Roth and then only as "a lawyer to defend them" (R. 230, 273, 344-345).

Another incorrect and misleading statement by the Government appears on p. 21 Gov. Br. "With reference to the part played by Roth in these cases, the evidence indicated that the Hodorowicz crowd was referred to him by Kretske, • • • and (Roth) also talked to Glasser about the cases, • • •." The Government complains of eight cases in which the Hodorowicz group were involved (Gov. Br. 14). The only case involving this group that Kretske referred to petitioner for trial was the Stony Island Avenue still case where Swanson, Dowiat and Anthony Hodorowicz were named as defendants. See Pet. Br. 6-8. The only other case involving this group where petitioner appeared as defense

counsel was the one in which Frank, Mike and Peter Hodorowicz and Dowiat were co-defendants charged with the illegal sales of alcohol. See Pet. Br. 8-9. In this latter case petitioner was engaged directly by Frank Hodorowicz after indictment (R. 858, 875). This is the only case about which petitioner talked to Glasser when he conferred with him as to his attitude of punishment on a plea of guilty (R. 858). The evidence clearly shows that the petitioner had no connections or dealings of any kind with relation to the other six cases (The 119th Street still R. 225-226, 242-243; the Peter Hodorowicz-Walter Hort case R. 254-256, 265-267, 299, 307; the Walter Hort case R. 267-268, 308-309; the Zarrattini case R. 304-306; the Clem Dowiat case R. 269-270; the 118th Place still R. 258-259, 276-277, 296-297).

Finally in the summary on this point (Gov. Br. 31) the Government again resorts to incorrect and misleading statements as follows: "The latter (potential defendants) were directed, usually by Horton, to Kretske. Kretske, in turn, suggested his ability 'to fix' the case and solicited money, announcing it was to go to Glasser. Kretske then referred the matter to Roth. Thereafter, except where payment had been refused or where the evidence indicated Glasser found he must proceed because of pressures, the case, in one way or another, died."

No potential defendants were ever referred to petitioner. Kretske did not refer to petitioner all his cases, or any matter dealing with alleged "fixing" as the above might imply. He did refer to petitioner *actual defendants* (R. 230, 700, 701, 861, 547, 857, 868) in three criminal cases to represent them on their respective trials. See Pet. Br. 6-8. He also referred the claimant in one civil case, after seizure by the Government of her automobile (R. 838, 874) to represent her on the trial in a libel action. See Pet. Br. 6.

The cases in which petitioner appeared as defense counsel have not in "one way or another died." In the four cases

referred by Kretske to the petitioner to be tried the results were as follows:

1. United States v. Swanson, Dowiat and Anthony Hodorowicz (Stony Island Avenue still).[2]

When petitioner together with his clients appeared in court on the set date ready for trial he learned the case had been stricken with leave to reinstate a week prior thereto (R. 236, 837). The uncontradicted testimony of Glasser is that this was done at the direction of the Government agent in charge of the investigators who advised Glasser they did not have sufficient evidence to convict[3] (R. 918-920).

2. United States v. Edward Dewes.

This case was continued several times because of the illness of Attorney Anderson who represented a co-defendant. Anderson finally became disabled (R. 823-824, 827) and his associate substituted for him during the preparation and trial of the case (R. 764-765, 827). Dewes was convicted and sentenced to the penitentiary[4] (R. 555, 857-858).

3. United States v. Harry Dukatt.

In a hearing before a United States Commissioner Dukatt was discharged. Subsequently two indictments were re-

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[2]The Government seeks to infer wrong doing with relation to the petitioner merely because the case was referred to the petitioner (who specialized in federal practice) to be tried. The petitioner prepared and appeared for hearing before the United States Commissioner and after indictment of his clients prepared and was ready for trial in the district court. See Pet. Br. 6-8.

[3]The record discloses the case as never having been reinstated (Ex. 226, R. 1034) with Glasser out of office a year and, therefore, is *still* pending.

[4]The Government does not argue this case with relation to petitioner.

turned against him and he entered a plea of guilty to both of them and was sentenced to the penitentiary[5] (R. 700-701).

4. United States v. One Chrysler Sedan.

This case was called for trial and submitted to District Judge Barnes on the alcohol tax unit agent's report (R. 717-718. See also R. 881-882). Judge Barnes ordered the car returned to the claimant.[6] See Pet. Br. 50-51.

The other cases in which petitioner appeared as counsel are as follows:

1. United States v. About 151 Acres of Land, etc.

This case was referred to petitioner by Attorney Baker to prosecute an appeal on behalf of the claimants who lost in the District Court (R. 749). The judgment of the District Court was reversed 99 F. 2d 716.[7]

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[5]The Government does not argue this case.

[6]The argument of the Government with relation to the petitioner in this case is "Without contradiction by Glasser, who represented the Government, Roth, counsel for Vitale's wife, stated at the hearing that Vitale was 'O.K.' and that the car was not used for illegitimate purposes." (Gov. Br. 29). It is ridiculous to assume that the petitioner who was experienced in the procedure and trial of libel cases (R. 749, 871-874) should introduce the character or reputation of the claimant's husband. While it was immaterial to the issues in a proceeding in *rem* to forfeit the car, it may be noted in passing that Judge Barnes was informed that the claimant's husband was a bootlegger. Judge Barnes testified that he remembered the case and that the claimant was the wife of a bootlegger (R. 717). It was not only entirely proper but the duty of the petitioner to state the position taken by his client in her sworn pleading, namely, that her car was not used for illegitimate purposes.

Petitioner does not know Leo Vitale (R. 874). Attorney Spatuzzo represented Leo Vitale in his criminal case (Ex. 165, R. 1034).

[7]The Government does not argue this case.

2. United States v. Paul Svec.

Petitioner represented Svec in two cases. In the first one he was convicted and sentenced to the penitentiary and appealed (R. 557, 854). While he was at liberty on an appeal bond he was arrested and after a full hearing before the United States Commissioner, was discharged (R. 557, 559). On appeal his conviction was affirmed (*United States* v. *Sebo*, 101 F. 2d 889).[8]

3. United States v. Frank, Mike and Peter Hodorowicz and Dowiat.

Petitioner appeared on arraignment of the defendants and entered their pleas of not guilty (R. 710, 859). After conferring with Glasser as to his attitude on pleas of guilty and advising his clients that Glasser's attitude was that he would insist on a substantial penitentiary sentence he was substituted by another lawyer (R. 858, 859). On the trial all the defendants were convicted and sentenced (R. 312).[9]

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[8]The Government does not argue the Svec cases with relation to the petitioner.

[9]The Government argues (Gov. Br. 21) that Frank Hodorowicz retained other counsel at the suggestion of Roth after he had seen Glasser and that this was particularly significant in the light of Roth's efforts at the trial below, to show that he was an expert in handling cases in the federal courts. This rare bit of reasoning would subject every lawyer to the ignominy of indictment if he suggests that a client engage other counsel because of refusal to follow his advice. In this case petitioner was of the opinion that as to three defendants a trial would be futile (R. 858). He conferred with Glasser as to his attitude on a plea of guilty which was proper and is the daily practice in the interest of economy to both defendants and the Government. The report to his clients that the attitude of Glasser on a plea of guilty was that he would insist on a substantial penitentiary sentence obviously did not meet with their approval so petitioner suggested to Frank Hodorowicz that he better get some other lawyer to try the case. Vindica-

Recapitulating the disposition of all the criminal and civil cases handled by petitioner about which the Government complains:

Criminal—

One still pending;

Convictions and sentences in all others (except discharge of Svec in a hearing in the case before Commissioner).

Civil—

Final judgment in District Court in one case;

Reversed by Circuit Court of Appeals in the other.

The argument of the Government (Gov. Br. 29-30) concerning the testimony of Alexander Campbell that petitioner asked Campbell if something could be done about not indicting Edward and William Wroblewski in the Northern District of Indiana is inane—as the testimony of Campbell is inherently incredible and contradicted since

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tion of the advice of petitioner is found in the fact that all the defendants in this case were convicted (R. 312) and on appeal all convictions were affirmed (105 F. 2d 218, 220, cert. denied 308 U. S. 584, 585).

Frank Hodorowicz, variable in his choice of lawyers, shopped around, going so far as to cali on Glasser to try to have him recommend one (R. 302). He called on Mr. Deneen (R. 332). He hired Mr. Hess to try his case (R. 334). He hired Mr. Struett to appeal his case (R. 334).

The Government argues that petitioner examined "the papers" in Glasser's office (Gov. Br. 18). Obviously, "the papers" referred to are the two indictments in the case when petitioner after engagement by Frank Hodorowicz and the filing of his appearance conferred with Glasser as to his attitude on a plea of guilty (R. 858). The garbled and confused testimony of Frank Hodorowicz (R. 311) that petitioner "with Kretske" examined "the papers" is as convincing as his testimony that petitioner was not present as his lawyer in court on his arraignment. See Gov. Br. 19, note 12. Indeed, the Government concedes that he is a confused witness (Gov. Br. 104, note 7).

at the time of the alleged conversation with Campbell, Edward and William Wroblewski *were already under indictment* for five months in the Northern District of Indiana (Exhibit 186-B, R. 840). Edward and William Wroblewski were then under bond to appear in court to answer to the indictment (Exhibit 186, 186-A, B & C, R. 840) which fact *was known* to the petitioner (R. 635, 676-677, 838-840). See Pet. Br. 10-12. It is contrary to reason to contend that petitioner who had experience in handling cases in the federal court (R. 796, 749, 782, 783, 833-834, 889, 890) would try to make an arrangement to prevent the return of an indictment which *he and his clients knew had in fact been returned five months before* the alleged conversation.

The incredible testimony of Alexander Campbell is further emphasized by his testimony that petitioner came to Indiana to ask him, virtually a stranger to petitioner, to "pull off" the investigator in the instant case working out of Chicago in the alcohol tax unit (R. 646) over whom Campbell would have no jurisdiction whatsoever.

Nevertheless, all the Alexander Campbell testimony (R. 680-685) was highly prejudicial and erroneously admitted over specific objections (R. 678-680, 717) as declarations made in pursuance and part of the execution of an alleged conspiracy to defraud the United States of the conscientious service of Glasser in the Northern District of Illinois. *United States* v. *Logan*, 144 U. S. 263, 308; *Collenger* v. *United States*, 50 F. 2d 345, 348 (CCA 7); *Mayola* v. *United States*, 71 F. 2d 65, 67 (CCA 9); *Minner* v. *United States*, 57 F. 2d 506, 511 (CCA 10).

It is clear that the evidence in this case fails utterly to show that petitioner was a party to any common design or agreement between the alleged conspirators. The Government's vague theory of the case was that "there was a conspiracy on foot to solicit certain persons to make

promises" (R. 154). There was no evidence of any kind, either direct or indirect, that petitioner solicited any person or made any promises to "fix" any case or that he conspired with anyone to defraud the United States of the conscientious service of Glasser or any one else.

The Government relies on circumstantial evidence to prove petitioner guilty of conspiracy (Gov. Br. 12), but the circumstances relied upon as a basis for such inference by the jury, must not only be consistent with the guilt of the petitioner, but must be inconsistent with every other reasonable hypothesis of innocence on his part. *Paddock* v. *United States*, 79 F. 2d 872, 876 (CCA 9); *Gargotta* v. *United States*, 77 F. 2d 977, 981 (CCA 8); *Nicola* v. *United States*, 72 F. 2d 780, 786 (CCA 3); *Romano* v. *United States*, 9 F. 2d 522, 524 (CCA 2).

The evidence in this case merely shows that petitioner appeared as defense counsel in a few cases, some of which were referred to him by Kretske, and that Glasser appeared in court as his adversary. Obviously, any testimony of the mere payment of money by third persons to alleged co-conspirators, accompanied by their hints, innuendoes, or statements, as to corruption of Glasser, gives rise to no legitimate inference that Roth was a party to any conspiracy. *United States* v. *Falcone*, 311 U. S. 205, 210-211.

"When the proof rests on circumstances which lead as rationally to the conclusion of innocence as of guilt, there is no proof of guilt, and nothing to go to the jury. Juries are not permitted in civil cases to speculate as to the negligence of the defendant (*A., T. & S. F. Ry. Co.* v. *Toops*, 281 U. S. 355, 50 S. Ct. 281, 74 L. Ed. 896 and cases there cited); they should not be permitted to guess at the guilt of the defendant in a criminal case." *Leslie* v. *United States*, 43 F. 2d 288, 290 (CCA 10).

Even on the basis of its incorrect and misleading statements, the Government concedes that the jury could have acquitted the petitioner under the evidence (Gov. Br. 12). Petitioner was therefore entitled to an acquittal and the trial court should have granted his motion for a directed verdict (R. 1042-1044).

As was said in *Cochran* v. *United States*, 41 F. 2d 193, 206 (CCA 8):

> "If, as conceded by counsel for the government, the jury might have acquitted him without being inconsistent with this record, then the circumstances proven are not inconsistent with the theory of his innocence and his guilt has not been proven by sufficient evidence beyond a reasonable doubt. The lower court should have granted his motion for a directed verdict."

CONCLUSION.

Wherefore, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

ALFRED E. ROTH,
Pro se.

November, 1941.